Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1998

MARK MCCLAIN,

Petitioner

v.

RICHARD C. SCHARRER et, al.,

Respondent(s).

On Petition For Writ of Certiorari to the
Southern District Court of Ohio, Western division, Western District

PETITION FOR WRIT OF CERTIORARI

Mark McClain
Petitioner,
577 Gramont Ave.
Dayton, Ohio 45407
(937) 263-7705

2488

QUESTIONS PRESENTED

1. Did the District Court improperly enter Respondent's motion for directed verdict and whether that Motion was entered contrary to law?

2. Did the District Court violate Petitioner's rights under the due process clause to the Fourteenth Amendment of the United States Constitution by dismissing the case without affording Petitioner the proper opportunity to present evidence to his claims?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the District of Columbia are Mark McClain, Richard C. Scharrer and Pickrel, Schaeffer & Ebeling.

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Appendix B - ORDER by The United States Court Of Appeals For The Sixth Circuit Dated December 21, 1998 (Page 5a)

Appendix C - DECISION Of The Supreme Court Of Ohio Dated April 1, 1999 (Page 9a)

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States District Court for the Southern District of Ohio entered on July 15, 1998.

OPINIONS BELOW

The decision of the United States District Court is unreported, (98-4208 July 15, 1998). (2a) The final order of the Court of appeals is also unreported, (98-00182 6th Cir. February 26, 1999).

BASIS FOR JURISDICTION

The final Judgment of the District Court was entered on July 15, 1998. The court of appeals had jurisdiction over this matter pursuant to 28 U.S.C. section 1291. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISION(S) INVOLVED

Pursuant to Rule 14(f) of the Supreme Court Rules, the citation of relevant constitutional provision(s) involved are listed here, while the pertinent text is set out in the appendix to this petition at (page 1a) Fourteenth Amendments to the United States Constitution.
U.S. Const. amend XIV, Section 1.

STATEMENT OF THE CASE

On June 6, 1998 Pursuant to Federal Rules of Civil Procedure 12 (b)(6) Respondent Scharrer filed a motion to dismiss that was based in part on the asserted-failure to state a claim upon which relief can be granted, on June 10, 1998 Respondent, Pickrel, Schaeffer & Ebeling filed a motion to dismiss incorporating such arguments and allegations in Respondent Scharrer's motion to dismiss. The district court as required by Federal Rules of Civil Procedure 12(b)(6) treated the motion to dismiss as one for summary Judgment as provided under Federal Rules of Civil Procedure 56.

On June 19, 1998 the Petitioner moved for summary judgment Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, the Respondents were absence of any plausible bases to conclude their reason for not acting contrarily under color of State law was worthy of belief, there were no genuine issue as to any material fact, and that no reasonable jury could return a verdict for which it would be in favor of the Respondents, Petitioner was entitled to judgment for the relief requested in the complaint under Federal Rules of Civil Procedure 50(b) as a matter of law, for such "State Action" under Title 42 U.S.C. Section 1983.

On July 14, 1998 the district court granted the enlargement of time for the Respondent Pickrel, Schaeffer & Ebeling, Petitioner's untimeliness of the appeal was the result of Petitioner's reliance on the erroneous extension of time for filing motions for reconsideration, or filing material pertinent to Respondent(s) motion under rule 56 . *Thompson v. I. N. S.*, 375 U.S. 384 (1964). see *Harris Lines v. Cherry Meat Packers*, 371 U.S. 215 (1962).

Pursuant to Federal Rules of Civil Procedure 12(b)(6) "All parties shall be given reasonable opportunity to present all material pertinent to such a motion by rule 56 ". Under rule 56 summary Judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The genuine issue of material fact that remained was to whether the Petitioner was in fact deprived of a constitutionally protected property interest, thus in contrast Respondent's motion for directed verdict under rule 50(a) was improperly entered, Federal rules of Civil procedure 50(a) allows a party to move for a direct verdict at the close of the other party's evidence, Petitioner's motion under rule 50(b) should not have been dismissed. On July 15, 1998 the district court dismissed the case for failure to state a claim and entered the judgment in favor of the Respondents and against the Petitioner.

On December 21, 1998 in the 6th Circuit Court of Appeals the matter was before the court upon consideration of the Petitioner's response to the court's October19, 1998 order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction on the basis of a late notice of appeal and on the basis that the notice of appeal did not designate the court to which the appeal was being taken. Petitioner responded stating that he appealed the district court's order of October 19, and that the appeal should not be dismissed for informality of form or title, arguing the merits.

Counsel for Richard C. Scharrer filed a motion on October 26, 1998 asking the count to dismiss the frivolous appeal on the basis that the notice of appeal was late because it was not filed within 30 days of the decision or within 10 days of the order denying relief from the judgment. Counsel then moved for sanctions for the preparation of the motion to dismiss. It appeared before the court that the final judgment of the district court was entered July 15, 1998 any time-tolling motions was required to be filed within ten days of the entry of the judgment, no motion regarding the judgment was entered within that period, the motion for reconsideration filed on September 4, 1998 was late, and that the appeal period was not tolled. Fed. R. App. P. 4 (a)(4).

Petitioner filed his notice of appeal on October 5, 1998 from the judgment filed on June 19, 1998. The court held the notice of appeal was late. Pursuant to Fed. R. App. P. 4(a) and 26(a). and moreover the notice of appeal was defective in that it failed to designate the name of the court to which the appeal was taken as required by Fed. R App. P.3(c). *United States v. Webb*, 157 F.3d 451, 453 (6th Cir 1998) (per curiam).

The failure of Petitioner to timely file his notice of appeal deprived the appellate court of jurisdiction. The court held that the compliance with Fed. R. App. P.4 (a) is mandatory and jurisdictional prerequisite which the court could neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396,1398 (6th Cir. 1989) (per curiam) and Fed. R. App. P.26(b) specifically provides that the court may not enlarge the time for filing a notice of appeal. The Court then ordered that the appeal be dismissed for lack of jurisdiction, the Respondent's motion for sanctions was denied. On December 30, 1998 Petitioner file for rehearing of the Court's order of December 21, 1998 on February 26, 1999 the court held it did not misapprehend or overlook any point of law or fact when it issued its order, the Petition for Rehearing was Denied.

On April 1, 1999 in the Supreme Court of Ohio, the matter was before the Court upon consideration of the Petitioner's Petition for writ of certiorari explaining why the case involved a substantial Constitutional question, the Supreme Court of Ohio rejected the Petitioner's Petition on the grounds that the Petitioner did not file the necessary documents required to perfect the appeal in the Supreme Court within the 45 days from the entry of the Judgment being appealed. S. Ct. Prac.R. II, Section 2(A)(1). and S. Ct. Prac. R. III, Section 1(D).

The cause presented critical issues pertaining to a substantial Constitutional question regarding the Petitioner's rights under the Fourteenth Amendment of the United States Constitution, whether any State shall deprive any person of life, liberty, or property, without due process of law nor deny to any person within it's jurisdiction the equal protection of the laws. The case involved a substantial Constitutional question of the district Court's decision effecting the Petitioner's rights under the Ohio Constitution, Article 1, Section 1.16. And under the due process and equal protection clauses of the U.S. Const. amend. XIV, Section 1. The case was appealed from the district court on the grounds that the Respondent's motion for a directed verdict was improperly entered.

The Petitioner concluded by arguing that the district court's decision invaded the Petitioner's rights under the Ohio Constitution, Article 1, Section 1.16. Which provides: " Every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." and that such an invasion violates Petitioner's Constitutional rights under the due process and equal protection clauses of the U.S. Const. amend. XIV, Section 1.

REASONS FOR GRANTING THE PETITION

I. Judical Review

I. Certiorari should be granted to consider whether the Final Judgment should be reversed because the decision was made without the procedure required by law.

The district court did not afford Petitioner the opportunity to present evidence to his claims or have them considered by the court which would have been fair or at least as directed under rule 50(b). Petitioner was faultless for such enlargement of time, and was simply "shut out" from the proceedings.

II. The Court should grant certiorari to consider whether the District Court's rulings were contrary to the law.

The district court's ruling violates Petitioner's Constitutional right under the due process clauses of the U.S. Const. amend. XIV, Section 1. Which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See *Webb v. Texas*, 409 U.S. 95 (1972). *Gilmore v. Taylor*, 508 U.S. 333 (1993) *Pennsylvania v.Ritchie* 480 U.S. 39 (1987) *United States v. Owens*, 484 U.S. 554 (1988) *Green v. Georgia*, 442 U.S. 95 (1979) *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) *Pilon v.Bordenkircher*, 444 U.S. 1 (1979).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark McClain
577 Gramont Ave.
Dayton, Ohio 45407
(937) 263-7705

Petitioner.

APPENDIX

U.S. Const. amend. XIV, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." reference to (page 1,6,7)

Mark McClain, Plaintiff-Appellant v. Richard C. Scharrer; Pickrel, Shaeffer & Ebeling Defendants -Appellees. United States Court of Appeals for the Sixth Circuit No. 98-4208 2/26/1999 ORDER by KENNEDY AND BATCHELDER CIRCUIT JUDGES; WISEMAN, DISTRICT JUDGE. denying Petition for rehearing. reference to (page 5)

Mark McClain, Plaintiff -vs- Richard C. Scharrer, et al.,, defendants. United States District Court for the Southern District of Ohio Western Division at Dayton. case No. C-3-98-182 7/15/1998 JUDGMENT IN A CIVIL CASE : by Mag. JUDGE MICHAEL MERZ reference to (page 3)

APPENDIX A- JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON DATED JULY15, 1998

MARK McCLAIN,

Plaintiff,

-vs-

RICHARD S. SCHARRER, et al.,

Defendant.

District Court for the Southern District of Ohio, Western Division
At Dayton,

July 15, 1998

No. C-3-98-182

Before Magistrate Judge Michael R. Merz

This case is before the Court on Defendant Scharrer's Motion to Dismiss (Doc. #2); Defendant Pickrel, Schaeffer & Ebeling's Motion to Dismiss (Doc. #9), and Plaintiffs Motion for Summary Judgment against all Defendants (Doc. #12). On Defendant Scharrer's Motion to Dismiss, the undersigned filed a Report and Recommendations (Doc.# 5), Mr. McClain filed Objections (Doc #8), and the parties later unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. Section 636(c), so that the undersigned considers the Objections rather than having them before a district judge. Although Plaintiff has failed to file a memorandum in opposition to Defendant Pickrel, Schaeffer & Ebeling's ("PS&E") Motion to Dismiss, the Court considers his Motion for Summary Judgment in lieu of such a memorandum.

Appendix A

Plaintiff's Complaint is captioned as a "Professional Negligence Complaint." The gravamen of the Complaint is that Defendant Scharrer as executor of the Estate of Geneva McClain and Attorney James Jacobson at PS&E as attorney for the executor failed to exercise due care in administering the estate, resulting in losses to the Plaintiff.

As the Court noted in the Report and Recommendations, federal courts are courts of limited jurisdiction and only have jurisdiction where it is expressly granted by Congress. Plaintiff acknowledges this, but says this action arises under federal law because it states a claim for relief under 42 U.S.C. Section 1983 for deprivation of property without due process of law.

As also explained in the Report and Recommendations, for a defendant to be liable under Section 1983, that defendant must have been acting under color of state law. The Court cited authority for the proposition that an executor does not act under color of state law. *Hagerty v. Succession of Clement*, 749 F.2d 217 (5t Cir 1984); cert. denied. 474 U.S. 968 (1985). In his Objections and again in his Motion for Summary Judgment, Mr. McClain argues strongly that Mr. Scharrer was a "state actor," but the Hagerty case specifically states that an executor is not a state actor. Obviously, not everyone who acts pursuant to a state statute can be a state actor; otherwise, for example, any driver could be held to be acting under color of state law because he or she exercises a privilege granted by the State. Executors act under the supervision of the Probate Court, but they do not become thereby agents of the court. There is no allegation in the Complaint that Mr. Scharrer was carrying out some unconstitutional policy of the Montgomery County Common Pleas Court so as to make him a State actor. Compare *Flagg Bros. v. Brooks* 436 U.S. 149,157 (1978).

Appendix A

An attorney for an executor is even less like a state actor than the executor. The Supreme Court has even held that a public defender, paid by the State to defend those accused of crime, is not a state actor. *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445,70 L.Ed.2d 509 (1981). Therefore PS&E cannot be held liable under Section 1983 for the acts Mr. Jacobson as attorney for Mr. Scharrer.

There is another reason why Plaintiff's Complaint fails to state a claim against the Defendants: it alleges that they were negligent. It is established by Supreme Court authority that negligence, even by a state actor, is not sufficient for an action under Section 1983. To put it another way, negligence by a state actor which deprives a person of property does not violate the Fourteenth Amendment and is therefore not actionable under Section 1983. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct 662,88 L.Ed.2d 662 (1986).

Accordingly, the Court concludes that the Complaint fails to state a claim upon which relief can be granted under federal law and therefore this Court does not have subject matter jurisdiction over the claims made in the Complaint. The Clerk will enter judgment dismissing the Complaint herein as to all Defendant without prejudice for failure to state a claim. Plaintiff's Motion for Summary Judgment is moot.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Defendants Richard C. Scharrer and Pickrell, Schaeffer & Ebeling and against the Plaintiff Mark McClain;

and that the Complaint, of the Plaintiff Mark McClain is DISMISSED WITHOUT PREJUDICE for failure to state a claim.

July 15, 1998

s/ Karla S. Evans
Deputy Clerk

APPENDIX B- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED DECEMBER 21, 1998

MARK MCCLAIN,

Plaintiff-Appellant,

v.

RICHARD C. SCHARRER; PICKREL, SCHAEFFER & EBELING,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

December 21, 1998

No. 98-4208

Before KENNEDY and BATCHELDER, Circuit Judges; WISEMAN, District Judge.*

This matter is before the court upon consideration of the appellant's response to this court's October 19, 1998 order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction on the basis of a late notice of appeal and on the basis that the notice of appeal did not designate the court to which the appeal was being taken. Appellant responded stating that he appealed the district court's order of October 19, that the appeal should not be dismissed for informality of form Or title, and he argues the merits of his appeal.

Appendix B-1

Counsel for Richard S. Scharrer filed a motion on October 26, 1998 asking the court to dismiss the frivolous appeal on the basis that the notice of appeal was late because it was not filed within 30 days of the decision or within 10 days of the order denying relief from the judgment. Counsel also seeks costs and attorney fees for the preparation of the motion to dismiss.

It appears from the documents before the court that the final judgment of the district court was entered July 15, 1998 Any time-tolling motion was required to be filed within ten days of the entry of the judgment No motion regarding the judgment was entered within that period, the motion for reconsideration filed on September 4, 1998 was late, and the appeal period was not tolled. See Fed. R App. P. 4 (a)(4). Appellant filed a notice of appeal on October 5, 1998 from the judgment

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*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

filed on June 19, 1998. The notice of appeal was late. See Fed. R. App. P. (a) and 26(a). Moreover, the notice of appeal is defective in that it fails to designate the name of the court to which the appeal is taken as required by Fed. R. App. P.3(c). See *United States v. Webb*, 157 F.3d 451, 453 (6th Cir, 1998) (per curiam).

The failure of appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. Compliance with Fed. R. App P 4 (a) is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam). Fed. R. App. P. 26(b) specifically provides that this court may not enlarge the time for filing a notice of appeal.

Accordingly, it is ordered that the appeal is dismissed for lack of jurisdiction. The appellee's motion for attorney fees and costs is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Clerk

Copies furnished to:

Honorable Walter H Rice
Mr. Kenneth J. Murphy

Appendix B-2

APPENDIX B- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED FEBRUARY 26, 1999

MARK MCCLAIN,

Plaintiff-Appellant,

v.

RICHARD C. SCHARRER; PICKREL, SCHAEFFER & EBELING,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

February 26, 1999

No. 98-4208

Before KENNEDY and BATCHELDER, Circuit Judges; WISEMAN, District Judge.*

Plaintiff-appellant has filed a petition for rehearing of this court's order of December 21, 1998 dismissing his appeal for lack of jurisdiction.

Appendix B-3

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P.40(a).

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Clerk

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*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

APPENDIX C- DECISION OF THE SUPREME COURT OF OHIO DATED APRIL 1, 1999

THE SUPREME COURT OF OHIO

April 1, 1999

CASE NO. 98-4208

District Court for the Southern District of Ohio, Western Division
At Dayton, No. C-3-98-182

MARK McCLAIN,

Plaintiff-Appellant,

v.

RICHARD C. SCHARRER, et al.,

Defendant-Appellees.

Please be advised that this Court does not have Jurisdiction over United States Courts of Appeals.

s/ Alicia F. DeBoard
Deputy Clerk